

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL CAMPBELL, JR. and
CYNTHIA CAMPBELL,

Plaintiffs,

v.

DECISION AND ORDER
09-CV-376A

NACCO MATERIALS HANDLING GROUP, INC.,
1581870 ONTARIO LIMITED, and
REPOLIFT LTD.,

Defendants.

This case was referred to Magistrate Judge Hugh B. Scott, pursuant to 28 U.S.C. § 636(b)(1). On March 17, 2011, defendant Nacco Materials Handling Group, Inc. ("Nacco") filed a motion (Dkt. No. 31) to preclude the expert testimony of Robert Cunitz pursuant to Rule 702 of the Federal Rules of Evidence. Also on March 17, 2011, Nacco filed a motion for summary judgment (Dkt. No. 32). On March 17 and 18, 2011, defendants 1581870 Ontario Limited ("Ontario") and Repolift Ltd. ("Repolift") filed their own motion for summary judgment (Dkt. Nos. 33, 34). On September 9, 2011, Magistrate Judge Scott filed a Report and Recommendation in which he recommended that Nacco's preclusion motion be granted in part, that Nacco's summary judgment motion be granted in its entirety, and that Ontario and Repolift's summary judgment motion be denied.

Plaintiffs, Ontario, and Repolift filed their respective objections on September 22, 2011. Nacco filed a response to plaintiffs' objections on October 5, 2011. The Court has deemed the matter submitted on papers pursuant to Rule 78(b) of the Federal Rules of Civil Procedure.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and Recommendation, and after reviewing the submissions, the Court adopts the Report and Recommendation in all respects except for the portion concerning Nacco's preclusion motion. The docket indicates that only Nacco filed a preclusion motion, and that no other defendants joined that motion. Since the Court is adopting Magistrate Judge Scott's recommendation to grant Nacco summary judgment, ruling on the preclusion motion is unnecessary. *Cf., e.g., Stofsky v. Pawling Cent. Sch. Dist.*, 635 F. Supp. 2d 272, 305 (S.D.N.Y. 2009) ("Because Defendants are entitled to summary judgment dismissing all of Plaintiff's claims, the Parties' motions to preclude expert testimony on the issue of damages are denied as moot."). The Court thus denies that motion as moot.

Accordingly, for the reasons set forth above and in Magistrate Judge Scott's Report and Recommendation, the Court hereby denies Nacco's preclusion motion (Dkt. No. 31) as moot; grants Nacco's summary judgment motion (Dkt. No. 32) and dismisses Nacco from the case; and denies Ontario and

Repolift's summary judgment motion (Dkt. Nos. 33, 34). Plaintiffs and the remaining defendants are directed to appear before the Court on **Thursday, December 8, 2011 at 9:00 a.m.**¹ for a status conference to set a trial date.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: November 1, 2011

¹ The Court reminds the parties that the status conference will occur at the Court's new location, at 2 Niagara Square, 9th Floor.

